STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 13, 2011
v	No. 291143 Saginaw Circuit Court
BOBBY GEORGE CONERLY, Defendant-Appellant.	LC No. 08-030490-FH

Before: FORT HOOD, P.J., and MURRAY and SERVITTO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of assault with a dangerous weapon (felonious assault), MCL 750.82, for which the trial court sentenced defendant, as a third habitual offender, MCL 769.11, to serve a term of imprisonment of two to eight years. We affirm.

This case arose from an incident that took place on the night of December 6, 2007, in Saginaw. The prosecuting attorney presented evidence that two police officers, wearing the sweatshirt-based uniforms of the Gang Task Force and driving substantially unmarked vehicles, spotted defendant in a car whose tail lights were lit, but whose headlights were either very dim or nonfunctional. According to the testimony of police witnesses, when the police attempted to effectuate a traffic stop and an officer approached defendant's vehicle, defendant looked at the officer then drove straight at him, forcing the officer to take quick evasive action.

Defendant testified he did not know that he was being approached by police officers until the end of the confrontation. Defendant recalled seeing flashing lights and thinking that someone wanted him to stop his car, but stated that he did not want to do so in what he believed to be a crime-ridden neighborhood. According to defendant, a car passed him and its driver stopped and approached him, in response to which defendant, still not recognizing the car or its driver as police affiliated, raised his hand over his head out of fear that "somebody was fixing to shoot me or something." Defendant further stated that when the other car's door opened, he "ducked down and hit the gas," adding that he did not steer toward the officer, and intended only to get away.

In addition to felonious assault, defendant was charged with resisting or obstructing a police officer, MCL 750.81d. The jury found defendant guilty of the assault charge, but not guilty of the resisting or obstructing charge.

Defendant's sole issue on appeal is whether certain prosecutorial argument deprived him of a fair trial. However, defendant admits that there was no objection below to the remarks now challenged on appeal. An unpreserved claim of prosecutorial misconduct is reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 761-762; 597 NW2d 130 (1999). Comporting with this standard is this Court's pronouncement in *People v Unger*, 278 Mich App 210; 749 NW2d 272 (2008) that "[r]eview of alleged prosecutorial misconduct is precluded unless the defendant timely and specifically objects, except when an objection could not have cured the error, or failure to review the issue would result in a miscarriage of justice." *Id.* at 234-235 (internal quotation marks and citation omitted).

Defendant makes issue of the following remarks from the prosecuting attorney's closing argument:

> I suggest that the defense will probably argue that, in fact, [defendant] didn't even know there was somebody out there. Didn't see anybody. I think [defendant] testified to that. Never saw [the police officer] or a person.
>
> Does that constitute a defense? Ladies and gentlemen, I suggest to you this scenario. Let us suppose a blind person were to walk in here and take a gun and just start shooting randomly, and hit someone. Would that be a valid defense? I didn't see anybody. Just because I hit somebody—it would not be a valid defense I suggest to you that, I didn't see anybody.
>
> No. You acted in such a way that you clearly caused—and the probability of harm to other persons was extremely high.
>
> . . . I think, if I recall [defendant's] testimony, that after he sees [the police officer's] car go by—and he may not even know it was a police vehicle. [Defendant] will tell you he actually covers his eyes with his arms and continues to drive.
>
> Ladies and gentlemen, I suggest to you even if that is true, that certainly constitutes the type of dangerous activity that this statute is design[ed] to perfect [*sic*]. I suggest to you it's not sufficient just to say, I didn't know, I didn't see.
>
> Because, again, if a blind person were to walk in here and just start shooting, I suggest it would not be a valid defense, and that it is not a valid defense for someone to say, I didn't see.
>
> You used that car. You were driving in such a way that the probability of injury was very high. He testified he wasn't going to stop. That is what [defendant] told you. I thought maybe I was going to get shot. He doesn't tell you why he thought he might be getting shot, other than the fact he is in "a bad neighborhood." He didn't say he was having any problems with any people. He is not saying he saw any gang members out there, any persons or anything—I'm not going to take a chance.
>
> I suggest that is not a sufficient defense.

Defendant further complains that the prosecuting attorney revisited this line of argument in rebuttal:

> To find [defendant] not guilty at this point you would have to completely believe what [defendant] told you and, also, decide that it's okay to be driving a car in such a way that you're basically incapable of seeing a pedestrian, however that pedestrian is dressed. That you somehow are operating in such a manner that you don't see a flashlight that is being shown [*sic*] right in front of your vehicle. You don't see a person standing right in front of your car, that is approaching your car, because you're driving in such a way, or in such a mental condition that gee, I didn't see any of that.
>
> * * *
>
> . . . [A]nd even if you believe what [defendant] says about having his arm up, think about what that is really telling you. He is trying to tell you well, because I am not really looking at what I'm doing, driving—that is an excuse—that it is okay for me to drive that way. That is ridiculous.
>
> Not every citizen has a right to drive, it's a privilege. In fact, I think the law would even tell you that if you're operating a vehicle you have to be licensed, supposed to have insurance, registration, all those great things. You're also supposed to be conscious of what you are doing. That is why we don't allow people to drive under the influence, because it makes it dangerous.
>
> * * *
>
> . . . There is no defense to what [defendant] did at that time.

These prosecutorial remarks did indeed include some misinformation. Among the elements a prosecutor must prove beyond a reasonable doubt to establish the crime of felonious assault is that the assailant acted "with the intent to injure or place the victim in reasonable apprehension of an immediate battery." *People v Chambers*, 277 Mich App 1, 8; 742 NW2d 610 (2007) (internal quotation marks and citation omitted). But the challenged prosecutorial remarks incorrectly suggested that mere recklessness can satisfy the intent element of felonious assault. That crime is one of specific intent. *People v Robinson*, 145 Mich App 562, 564; 378 NW2d 551 (1985). Accordingly, "it would be improper to convict of an assault . . . as the result of criminally negligent behavior." *People v Lakeman*, 135 Mich App 235, 239; 353 NW2d 493 (1984).

However, the trial court admonished the jury, "It is my duty to instruct you on the law. You must take the law as I give it to you. If a lawyer says something different about the law, follow what I say." The court then went on to instruct the jury that proof of felonious assault required proof beyond a reasonable doubt that defendant "intended either to injure [the complaining police officer], or to make him reasonably fear an immediate battery."

It is well established that "[j]urors are presumed to follow instructions, and instructions are presumed to cure most errors." *People v Petri*, 279 Mich App 407, 414; 760 NW2d 882

(2008). In this case, although the prosecuting attorney did argue extensively that mere recklessness could satisfy the intent element for this specific intent crime, the trial court had the last word on the matter. Because the court both correctly instructed the jury on the intent element for felonious assault, and also on the duty to follow the court's statements of the law, not those of counsel, we presume that the jury deliberated with the correct understanding of the applicable law. See *id.*

Defendant argues that the jury's rejection of the resisting or obstructing charge indicates that the jury believed defendant's testimony, and thus should logically be understood to have found defendant guilty on the basis of the prosecuting attorney's incorrect argument that defendant's own testimony indicated sufficient recklessness to satisfy the intent element of felonious assault. We disagree. Resisting or obstructing requires that the offender know that he or she is resisting or obstructing a person, such as a police officer, who is attending to official duties. Not so felonious assault, where the status of the victim does not factor into the elements of the crime. Accordingly, the jury could have believed defendant's protestations that he did not know he was dealing with the police until after the confrontation, and thus found him not guilty of resisting or obstructing, while discounting defendant's account of having driven at the police officer with no intent to strike him or cause him to fear an imminent battery, and thus found him guilty of felonious assault.

For these reasons, defendant has failed to show that this plain error resulted in a miscarriage of justice. See *Unger*, 278 Mich App at 234-235.

Alternatively, defendant argues that defense counsel's failure to preserve this issue constituted ineffective assistance of counsel. "In reviewing a defendant's claim of ineffective assistance of counsel, the reviewing court is to determine (1) whether counsel's performance was objectively unreasonable and (2) whether the defendant was prejudiced by counsel's defective performance." *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Regarding the latter, the defendant must show that the result of the proceeding was fundamentally unfair or unreliable, and that but for counsel's poor performance the result would have been different. *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997).

For the same reasons that defendant has failed to show a miscarriage of justice, defendant has failed to show that his trial was fundamentally unfair or unreliable, or that the result would have been different but for counsel's error, for purposes of winning relief on his theory of ineffective assistance.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Christopher M. Murray
/s/ Deborah A. Servitto